MOTION FILED
FEB 3 1994

No. 93-1098

In the
Supreme Court of the United States
October Term, 1993

OUTBOARD MARINE CORPORATION,
Petitioner,

v.

DAVID R. WOLTERING,
Administrator of the Estate
of Stacey Lee Grace,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE APPELLATE COURT OF ILLINOIS,
FIFTH DISTRICT

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF OF THE NATIONAL MARINE MANUFACTURER'S ASSOCIATION, AS AMICUS CURIAE, IN SUPPORT OF OUTBOARD MARINE CORPORATION'S PETITION FOR A WRIT OF CERTIORARI

Richard A. Mueller
Counsel of Record
COBURN & CROFT
One Mercantile Center
Suite 2900
Saint Louis, Missouri 63101
(314) 621-8575

Counsel for the National Marine Manufacturer's Association, as Amicus Curiae

1994 — Bachman Legal Printing ■ (612) 339-9518 ■ FAX (612) 337-8053

QUESTIONS PRESENTED FOR REVIEW

I. Whether The Fatal Injury Of A Passenger On A Recreational Boat Being Operated On Navigable Waters When She Was Thrown Or Fell Overboard And Came Into Contact With The Propeller Of The Boat's Outboard Motor Bears A Substantial Relationship To Traditional Maritime Activity In Order To Bring It Within Maritime Law?

II. Whether Decedent's Nondependent Parent And Sibling May Recover Loss Of Society Damages Under Maritime Law?

No. 93-1098

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1993

OUTBOARD MARINE CORPORATION,
Petitioner,

v.

DAVID R. WOLTERING,
Administrator of the Estate
of Stacey Lee Grace,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE APPELLATE COURT OF ILLINOIS,
FIFTH DISTRICT

MOTION FOR LEAVE TO FILE BRIEF OF THE NATIONAL MARINE MANUFACTURER'S ASSOCIATION, AS AMICUS CURIAE, IN SUPPORT OF OUTBOARD MARINE CORPORATION'S PETITION FOR A WRIT OF CERTIORARI

Applicant, the National Marine Manufacturer's Association ("NMMA"), moves the Court for permission to file an amicus curiae brief in support of Outboard Marine Corporation's Petition for a Writ of Certiorari. Petitioner

Outboard Marine Corporation ("OMC") has given consent, but respondent has not, and leave to file must be sought pursuant to Supreme Court Rule 37.2.

NATURE OF NMMA'S INTEREST

This case involves the question of the scope of maritime law and its application to the facts presented herein. This Court has long held that this body of law must be applied uniformly to all vessels operated on navigable waters in order to protect maritime activities and to provide predictability both with regard to the events which give rise to liability and in the relief available. The Illinois Appellate Court deviated from the principle of uniformity when it held that recreational boating was not covered by maritime law.

The NMMA has a very strong interest in the disposition of the issues concerning maritime law presented in this case. The NMMA is an international, not-for-profit association of marine product manufacturers who design, produce, and distribute recreational boats, engines, parts, and equipment. The NMMA, including its predecessor organizations, was founded in 1906. Today, the NMMA has approximately 1500 members. NMMA members produce approximately eighty percent of the marine products used by recreational boaters and fishermen in the United States.

The fundamental mission of the NMMA is to promote and to encourage recreational boating and the recreational boating industry. The NMMA offers its members and the recreational boating industry a broad spectrum of programs and services including technical services and advice, statistical analyses, participation in and support of trade shows, promotion and advertising, improvements in and advocacy of safety, and assistance in the exportation of the products and services of its members. Also, in furtherance of its mission, the NMMA is and has been involved in lawsuits as both a party and as

amicus curiae and in other activities concerning governmental relations.

The members of the NMMA manufacture and sell recreational boats subject to the Federal Boat Safety Act, 46 U.S.C. § 4301 (Supp. 1993). Their products must also be designed in accordance with the United States Coast Guard regulations promulgated under the Act. The NMMA coordinates a certification program that assures consumers that all boats and associated equipment, which satisfy the NMMA certification requirements, meet mandatory United States Coast Guard regulations as well as voluntary safety and engineering standards (such as the standards promulgated by the American Boat and Yacht Council). The NMMA considers uniformity in maritime law vitally important, particularly in areas of boat design and rules of conduct for boat operators.

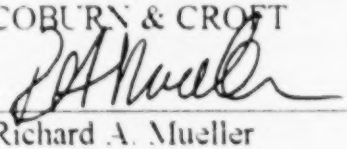
The inconsistency of the Illinois Appellate Court decision with prior decisions of this Court threatens the predictability achieved by this Court in maritime law, which includes recreational boating activities. Recreational boating constitutes a large industry involving an extensive number of participants, boats, and locations. The recreational boating industry employs nearly 400,000 people in the United States, with annual sales in excess of 11 billion dollars. The industry presently includes over 20 million recreational boats in the United States. Because the important issues of maritime law involved in this case may substantially affect the uniformity of that body of law and thereby seriously impact the recreational boating industry, the NMMA seeks to file a brief in support of OMC's Petition for a Writ of Certiorari.

NMMA CAN MAKE A UNIQUE CONTRIBUTION ON RELEVANT ISSUES

The NMMA's perspective, arising from its interest in uniformity and predictability of federal maritime law, necessarily differs from those of the parties to this particular action who are specifically interested in the outcome of this case. The NMMA respectfully encourages this Court to grant OMC's Petition for a Writ of Certiorari and the NMMA's Motion for Leave to Appear as Amicus Curiae (1) to clarify the continuing uncertainty that exists regarding the application of maritime law to recreational boating; (2) to insure uniformity by simplifying the application of maritime law in these cases by ruling that recreational boating is maritime commerce, and (3) to resolve a conflict among the lower courts regarding the application of maritime law when a passenger in the water sustains injuries. The NMMA can effectively and objectively explain the need for a decision by this Court that fosters national uniformity and stability on the issues presented.

Respectfully submitted,

COBURN & CROFT

By: 

Richard A. Mueller
One Mercantile Center
Suite 2900
St. Louis, Missouri 63101
(314) 621-8575

Counsel for the National Marine Manufacturer's Association, Applicant for Leave to File Brief as Amicus Curiae

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

MOTION FOR LEAVE TO FILE BRIEF OF THE NATIONAL MARINE MANUFACTURER'S ASSOCIATION, AS AMICUS CURIAE, IN SUPPORT OF OUTBOARD MARINE CORPORATION'S PETITION FOR A WRIT OF CERTIORARI ii

NATURE OF NMMA'S INTEREST iii

NMMA CAN MAKE A UNIQUE CONTRIBUTION ON RELEVANT ISSUES v

TABLE OF AUTHORITIES viii

BRIEF OF THE NATIONAL MARINE MANUFACTURER'S ASSOCIATION, AS AMICUS CURIAE, IN SUPPORT OF OUTBOARD MARINE CORPORATION'S PETITION FOR A WRIT OF CERTIORARI 1

NATURE OF NMMA'S INTEREST 1

INTRODUCTION 2

STATEMENT OF THE CASE 2

ARGUMENT 2

I. The Illinois Appellate Court Erroneously Ruled That The Fatal Injury Of A Passenger On A Recreational Boat Being Operated On Navigable Waters When She Was Thrown Or Fell Overboard And Came Into Contact With The Propeller Of The Boat's Outboard Motor Did Not Bear A Substantial Relationship To Traditional Maritime Activity And Thereby Unjustifiably Refused To Apply Maritime Law 2

A. Uniform Definition of Maritime Law 3

B. Application of Maritime Law 7

C. Recreational Boating Constitutes a Commercial Maritime Activity 9

D. Maritime Law Applies to the Present Case 13

II. The Illinois Appellate Court Erroneously Reversed The Trial Court's Finding That Decedent's Nondependent Parent And Sibling Could Not Recover Loss Of Society Damages Under Maritime Law 16

CONCLUSION 17

TABLE OF AUTHORITIES

Page

Cases -- U.S. Supreme Court

East River S.S. Corp. v. Transamerica Delaval, Inc.,
476 U.S. 858 (1986) 8

Executive Jet Aviation, Inc. v. City of Cleveland,
409 U.S. 249 (1972) 3, 4

Foremost Insurance Co. v. Richardson,
457 U.S. 668 (1982) 3, 4, 7, 9, 11, 13, 14, 16

Miles v. Apex Marine Corp.,
498 U.S. 19 (1990) 17

Moragne v. States Marine Lines, Inc.,
398 U.S. 375 (1970) 9, 16, 17

Sisson v. Ruby,
497 U.S. 358 (1990) 5-14, 16, 17

The Plymouth, 70 U.S. (3 Wall.) 20 (1866) 3

Cases -- Other Courts

Anderson v. Whittaker Corp.,
692 F. Supp. 764 (W.D. Mich. 1988),
aff'd in part, rev'd in part on other grounds,
894 F.2d 804 (6th Cir. 1990) 8, 9, 16

Coats v. Penrod Drilling Corp.,
5 F.3d 877 (5th Cir. 1993) 14

Complaint of Bird,
794 F. Supp. 575 (D.S.C. 1992) 7, 13, 14

Delta County Ventures, Inc. v. Magana,
986 F.2d 1260 (9th Cir. 1993) 10, 14

Elliott v. Brunswick Corp.,
903 F.2d 1505 (11th Cir. 1990),
cert. denied, 498 U.S. 1048 (1991) 15

Great Lakes Dredge & Dock Co. v. City of Chicago,
3 F.3d 225 (7th Cir. 1993) 9

Kunreuther v. Outboard Marine Corp.,
715 F. Supp. 1304 (E.D. Pa. 1989) 14, 15

Lipworth v. Kawasaki Motors Corp., U.S.A.,
592 So.2d 1151 (Fla. App. 1992) 17

Mowery v. Mercury Marine,
773 F. Supp. 1012 (N.D. Ohio 1991) 15

Sieracki v. Seas Shipping Co.,
149 F.2d 98 (3d Cir. 1945),
aff'd, 328 U.S. 85 (1946) 8

Souther v. Thompson, 754 F.2d 151 (4th Cir. 1985) 4

Truehart v. Blandon,
672 F. Supp. 929 (E.D. La. 1991) 16

Wahlstrom v. Kawasaki Heavy Industries,
4 F.3d 1084 (2d Cir. 1993) 9, 15, 17

Woltering v. OMC,
615 N.E.2d 86 (Ill. App. 1993) 15

Statutes/Regulations

28 U.S.C. § 1333 (1993) 15

33 U.S.C. § 2001 (1986 and Supp. 1993) 11

46 U.S.C. § 688 (1988) 16

46 U.S.C. § 761 (1988) 16

46 U.S.C. § 4301 (Supp. 1993) 11, 15

46 U.S.C. § 13110 (Supp. 1993) 11

Secondary Authorities

American Red Cross National Boating Survey (1991) 10

National Transportation Safety Board,
Recreational Boating Safety Study (1993) 11

NMMA, Boating 1993 (1993) 10

U.S. Dep't of Transp., U.S. Coast Guard,
Boating Statistics 1989 (1989) 12

U.S. Dep't of Transp., U.S. Coast Guard,
Boating Statistics 1992 (1992) 12

No. 93-1098

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1993

OUTBOARD MARINE CORPORATION,
Petitioner,

v.

DAVID R. WOLTERING,
Administrator of the Estate
of Stacey Lee Grace,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE APPELLATE COURT OF ILLINOIS,
FIFTH DISTRICT

BRIEF OF THE NATIONAL MARINE MANUFACTURER'S ASSOCIATION, AS AMICUS CURIAE, IN SUPPORT OF OUTBOARD MARINE CORPORATION'S PETITION FOR A WRIT OF CERTIORARI

NATURE OF NMMA'S INTEREST

This is stated in the Motion which precedes this Brief.

INTRODUCTION

The NMMA respectfully submits this brief as amicus curiae in support of the Petition for a Writ of Certiorari filed by Outboard Marine Corporation.

STATEMENT OF THE CASE

The NMMA hereby adopts and incorporates as if set forth herein the Statement of Facts and Procedural History contained in OMC's Petition for a Writ of Certiorari.

ARGUMENT

I. The Illinois Appellate Court Erroneously Ruled That The Fatal Injury Of A Passenger On A Recreational Boat Being Operated On Navigable Waters When She Was Thrown Or Fell Overboard And Came Into Contact With The Propeller Of The Boat's Outboard Motor Did Not Bear A Substantial Relationship To Traditional Maritime Activity And Thereby Unjustifiably Refused To Apply Maritime Law.

As explained herein, this Court has invested much interest in the determination of the scope of maritime law. To protect commercial maritime activities and to provide predictability regarding the events which give rise to liability and in the relief available, this Court has insisted on uniform laws applicable to all commercial vessels on navigable waters. There is no legitimate distinction between a recreational boat and a commercial vessel, and this Court has never found such a distinction under maritime law. In essence, this Court has equated recreational boating with commerce. The Illinois Appellate Court's decision rejects that equation.

The Illinois Appellate Court's decision in this case, that events "involving a pleasure boat" are not subject to maritime law, is inconsistent with decisions of this Court. Moreover, the patent error below represents a deviation from the mandate of uniformity and offers recreational boaters greater and different recovery than would be allowed a similar person on a commercial boat. This Court should expressly declare that recreational boating is "commerce" and therefore subject to maritime law, clarifying any confusion arising from prior cases and simplifying the application of maritime law.

A. Uniform Definition of Maritime Law.

Prior to 1972, courts applied maritime law to all actions which involved an accident that occurred on navigable waterways. The Plymouth, 70 U.S. (3 Wall.) 20, 36 (1866). In Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249 (1972), this Court modified the "locality" test. Executive Jet involved an airplane crash on a navigable waterway, and this Court determined that no maritime interests were furthered by having an aviation matter decided under maritime law. Accordingly, the Executive Jet Court required that in addition to the event occurring on a navigable waterway, the event must bear "a significant relationship to traditional maritime activity." Id. at 268. Subsequently, the principle announced in Executive Jet has been known as the "locality plus" test.

Following Executive Jet, some believed that the locality plus test meant that maritime law only applied to commercial boating. This Court, in Foremost Insurance Co. v. Richardson, 457 U.S. 668 (1982), rejected that notion and ruled that maritime law applies to recreational boaters. Foremost involved a collision between two small recreational boats on the Amite River in Louisiana, a navigable waterway. No commercial maritime interests were involved. The

Foremost Court applied the nexus requirement established in Executive Jet and emphasized the need for the event to have a "potential disruptive" impact on maritime commerce rather than an actual impact. Id. at 675. The Court held that protection of maritime commerce and other marine related industries cannot be achieved without uniform rules applicable to all vessels operated on navigable waterways, without regard to their participation in any commercial activity. Id. at 674. The Foremost Court explained that:

> The federal interest in protecting maritime commerce. . . . can be fully vindicated only if all operators of vessels on navigable waters are subject to uniform rules of conduct. The failure to recognize the breadth of this federal interest ignores the potential effect of noncommercial maritime activity on maritime commerce. . . .
>
> We decline to inject the uncertainty inherent in such line-drawing into maritime transportation. Moreover, the smooth flow of maritime commerce is promoted when all vessel operators are subject to the same duties and liabilities.

Id. at 674-76.[1]

Following Foremost, some courts believed that the application of maritime law to recreational boaters was limited to circumstances in which there was a navigational error.[2] Because of the continuing confusion concerning the

---

[1]See Foremost, 457 U.S. at 676-77 (listing examples of congressional activities that support the Court's call for uniform rules).

[2]See, e.g., Souther v. Thompson, 754 F.2d 151 (4th Cir. 1985).

application of maritime law, this Court addressed the issue again in Sisson v. Ruby, 497 U.S. 358 (1990). Sisson involved a 56 foot pleasure sailboat docked at an entirely recreational marina on Lake Michigan, a navigable waterway. While docked, a fire erupted in the sailboat's washer/dryer unit, destroying Sisson's vessel, several neighboring vessels, and part of the marina. In response to claims filed against him, Sisson sought a declaratory judgment to limit his liability, claiming that maritime law applied to this event. This Court unanimously agreed, ruling that maritime law precluded the application of state law. Id. at 367.

The Sisson Court concluded that maritime law applied to events on navigable waters that (1) pose a "potential hazard to maritime commerce," and (2) arise out of an "activity that bears a substantial relationship to maritime activity." Id. at 362-63. The Court rejected numerous proposals from amicus curiae to limit the scope of this test and called for a broad reading and application of these requirements. First, the Court rejected a narrow "fact dependent" analysis of the potential disruptive effect on maritime commerce, stating:

> We determine the potential impact of a given type of incident by examining its general character. The jurisdictional inquiry does not turn on the actual effects on maritime commerce of the fire on Sisson's vessel; nor does it turn on the particular facts of the incident in this case, such as the source of the fire or the specific location of the yacht at the marina, that may have rendered the fire on the Ultorian more or less likely to disrupt commercial activity. Rather, a court must assess the general features of the type of incident involved to determine whether such an activity is likely

> to disrupt commercial activity. Here, the general features - a fire on a vessel docked at a marina on navigable waters - plainly satisfy the requirement of potential disruption to commercial maritime activity.

Id. at 363 (emphasis added). Thus, the purely recreational nature of the case was completely irrelevant.

Second, the Court likewise broadly interpreted the requirement that the event bear a substantial relationship to traditional maritime activity. The Court stated:

> Our cases have made clear that the relevant "activity" is defined not by the particular circumstances of the incident, but by the general conduct from which the incident arose. . . . Thus, in this case, we need not ascertain the precise cause of the fire to determine what "activity" Sisson was engaged in; rather, the relevant activity was the storage and maintenance of a vessel at a marina on navigable waters. [Footnote omitted.]

Id. at 364-65. Consistent with its refusal to consider the specific facts and its goal of uniformity, the Sisson Court expressly rejected any "navigational error" requirement by stating:

> a narrow focus on navigation would not serve the federal policies that underlie our jurisdictional test. The fundamental interest giving rise to maritime jurisdiction is "the protection of maritime commerce," . . . and we have said that that interest cannot be

> fully vindicated unless "all operators of vessels on navigable waters are subject to uniform rules of conduct." [Citation omitted.] The need for uniform rules of maritime conduct and liability is not limited to navigation, but extends at least to any other activities traditionally undertaken by vessels, commercial or noncommercial.

Id. at 367 (emphasis added). Thus, the Sisson Court explained that, under the required broad analysis, navigation is not the sole traditional maritime activity. In fact, Sisson suggested that it is difficult to name an activity of a boat in water that would not constitute a traditional maritime activity.[3]

B. Application of Maritime Law.

Many courts following Sisson have attempted to maintain uniformity and have found that a variety of events involving recreational boats on navigable waters are within maritime law.[4] For example, in Complaint of Bird, 794 F. Supp. 575

---

[3]The concurring judges in Sisson agreed. Sisson, 497 U.S. at 374 (Scalia, White, J.J., concurring). They explained that

> a vessel engages in traditional maritime activity for these purposes when it navigates, as in Foremost, when it lies in dock, as in the present case, and when it does anything else (e.g., dropping anchor) that vessels normally do in navigable waters. It would be more straightforward to jettison the "traditional maritime activity" analysis entirely, and to return (for vessels) to the simple locality test. . . .

Id.

[4]See Petitioner's Petition for a Writ of Certiorari, pp. 14-15 (discussing decisions by other courts applying maritime law to a variety of situations with which the decision in the present case conflicts).

(D.S.C. 1992), the court held that maritime law applied to a claim by a passenger on a recreational boat who was pushed overboard by another passenger while the boat was anchored in shallow water near a tributary of the North Edisto River. After conducting the abstract analysis required by Sisson, the court concluded that the loss of a passenger overboard "would potentially have an impact on maritime commerce." Id. at 580. The court stated that it

> may not limit its inquiry to whether there is the potential of disruption of commercial maritime activity in the tributary, or even anywhere in the North Edisto River. The court instead must remove the scene of the accident to the busiest of maritime thoroughfares and then ask whether a passenger thrown overboard from a pleasure craft on that major thoroughfare has the potential of disrupting maritime activity.

Id. The court also found that the anchoring of a boat in navigable waters (the general conduct from which the action arose) constituted a traditional maritime activity. Id. at 581.

Courts also promote uniformity by holding that maritime law applies to theories such as product liability. In fact, this court recognized product liability actions based on negligence and strict liability as part of the general maritime law in East River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858, 866 (1986). Lower courts included product liability cases in general maritime law as early as 1946. Sieracki v. Seas Shipping Co., 149 F.2d 98 (3d Cir. 1945), aff'd, 328 U.S. 85 (1946). Despite the decision in East River, the plaintiffs in Anderson v. Whittaker Corp., 692 F. Supp. 764 (W.D. Mich. 1988), aff'd in part, rev'd in part on other grounds, 894 F.2d 804 (6th Cir. 1990), argued that maritime law should not

apply to a product liability case because such cases have no connection with traditional maritime activity. The Anderson court expressly stated: "[t]he fact that products liability is involved, however, does not affect the applicability of maritime law. . . ." 692 F. Supp. at 768. Moreover, the Second Circuit Court of Appeals recently noted that general maritime law "includes elements adopted from the law of products liability" in a case in which a minor was fatally injured when the personal watercraft he was operating collided with a small outboard motorboat. Wahlstrom v. Kawasaki Heavy Industries, 4 F.3d 1084, 1087 (2d Cir. 1993).

C. Recreational Boating Constitutes a Commercial Maritime Activity.

Throughout the foregoing development of maritime law, the constant goal of this Court has been to achieve uniformity as it applies to commercial and recreational activities. This Court defined maritime law broadly in order to achieve this constitutionally mandated goal. See Moragne v. States Marine Lines, Inc., 398 U.S. 375, 402 (1970) (indicating that the Constitution requires that a single body of law apply uniformly and coextensively on all navigable waters).

Accordingly, the fundamental error committed by the Illinois Appellate Court was its decision that maritime law does not apply to recreational boating. Although this Court confronted this issue in both Foremost and Sisson, some confusion obviously remains. Accordingly, the NMMA urges this Court to clarify this issue and rule that recreational boating constitutes a commercial maritime activity. Such a ruling, would, at last, resolve the continuing confusion in many courts as to when maritime law applies to recreational boating. Such a ruling would also be consistent with this Court's ruling in Sisson. In fact, the Seventh Circuit Court of Appeals in Great Lakes Dredge & Dock Co. v. City of Chicago, 3 F.3d

225, 228 n.4 (7th Cir. 1993), has suggested that in Sisson this "Court concluded that aquatic recreation is commerce" by ruling that the fire "plainly satisf[ied]" the requirement that the event pose a potential hazard to commercial activity. This Court should endorse the Seventh Circuit's interpretation of Sisson and reject the restrictive Ninth Circuit view in Delta County Ventures v. Magana, 986 F.2d 1260 (9th Cir. 1993).

The conclusion that "aquatic recreation is commerce" is logical in light of the fact that recreational boating constitutes an important segment of the United States marine industry. Consumers spent over 11 billion dollars in recreational boating industry activities in 1993. NMMA, Boating 1993 2 (1993). These expenses included the cost of new and used boats, motors and engines, accessories, safety equipment, fuel, insurance, docking, maintenance, launching, storage, repairs, and club memberships. Id. To meet these consumer demands, the recreational boating industry employed an estimated 389,600 people in 1993. NMMA Estimate.

According to Coast Guard records, boat sales have steadily increased for the last twenty years. American Red Cross National Boating Survey 23 (1991) [hereinafter National Boating Survey].[5] The Coast Guard currently estimates that there are twenty million recreational boats in the United States. Id. at 25. The recreational boating industry includes motorboats, sailboats, canoes, fishing boats, personal watercraft, and high performance boats. Id. at 21.

Approximately 75,231,000 people participated in recreational boating industry activities in 1993. Boating 1993, at 2. Those participants spend almost five billion passenger hours involved in recreational boating activities each year. National Boating Survey, at 86. These activities occur on "50 million acres of lakes, 633,000 miles of rivers, and along the

---

[5]The National Boating Survey was commissioned by the United States Coast Guard.

88,633 miles of coastline in the United States." National Transportation Safety Board, Recreational Boating Safety Study 13 (1993).

As further support for the ruling sought herein, the federal government has treated recreational boating as a commercial maritime activity. Congress has enacted Acts which require that all vessels be designed uniformly, Federal Boat Safety Act, 46 U.S.C. § 4301 (Supp. 1993), and has established a National Boating Safety Advisory Counsel, 46 U.S.C. § 13110 (Supp. 1993), to advise the Coast Guard on safety issues relating to recreational boating. Congress has also established Inland Navigation Rules, 33 U.S.C. § 2001 (1986 and Supp. 1993), which apply to all vessels upon inland waters whether recreational or commercial. The authority to enforce these Acts is vested in the Coast Guard, through the Department of Transportation. The Coast Guard promulgates design and safety regulations applicable to all types and sizes of vessels from seven foot long personal watercraft to 100 foot long barges. Both types of vessels regularly utilize the Mississippi River where the accident occurred. Both the magnitude of the industry and the treatment of the industry by the federal government indicate that recreational boating constitutes commercial maritime activity.

Whether or not this Court rules that recreational boating is maritime commerce, in order to be consistent with Congressional and Coast Guard activity in this field, this Court must make it clear that recreational boaters are governed by the same law which governs commercial maritime activities. As found by this Court in Foremost and Sisson and numerous lower federal courts, recreational boating accidents pose a potential hazard on commercial maritime activities. The impact on maritime commerce, in fact, seems inescapable in light of the 75 million recreational boaters, the 20 million recreational boats, and the 5 billion passenger hours spent

every year on navigable waterways. Necessarily, such an expansive industry results in a large number of accidents.

In 1992, 6,048 recreational boating accidents were reported to the United States Coast Guard. U.S. Dep't of Transp., U.S. Coast Guard, Boating Statistics 1992 11 (1992). Of the reported accidents, 3,278 occurred in navigable waters governed by federal law. Id. at 10. Many recreational boating accidents, however, go unreported each year. The Coast Guard has concluded that they receive reports for only ten percent of all non-fatal accidents while receiving reports for almost all fatal accidents. Id. at 2. For example, in 1989, 6,063 accidents were reported to the Coast Guard. U.S. Dep't of Transp., U.S. Coast Guard, Boating Statistics 1989 13 (1989). A survey conducted by the American Red Cross, however, estimated that a total of 649,673 recreational boat accidents occurred during the 1988-89 recreational boating season. National Boating Survey, at 279. Of these accidents, 236,599 were reportable accidents pursuant to Coast Guard reporting criteria in that they involved death, injury, or property damage. Id. For the same period, the American Red Cross reported that 7,109,000 recreational boaters were involved in actual critical incidents or accidents, meaning a boat needed help to reach shore or an accident occurred involving a mechanical failure, grounding, a fall overboard, death, submersion, or other injuries or property damage. Id. at 265. Such rescue activities, of necessity, have the potential to disrupt commercial shipping.

Based on the foregoing, the Illinois Appellate Court's refusal to apply maritime law to the present case because it "involved a pleasure boat" is inconsistent with decisions of this Court and with the realities of the industry. The failure to treat recreational boats and commercial vessels uniformly will have implications on the industry and interject uncertainty to the law which this Court attempted to clarify in Sisson. This Court should grant OMC's Petition for a Writ of Certiorari to

insure continued predictability and stability in the application of maritime laws.

D. Maritime Law Applies to the Present Case.

Finally, under the existing precedent of this Court, maritime law governs the facts of the present case. The decedent, in the present case, was a passenger on a pleasure craft being operated on the Mississippi River when she was thrown or fell overboard, allegedly came into contact with the propeller of the boat's outboard motor, and was fatally injured. Respondents, decedent's father and sister, sued OMC, the manufacturer of the boat's outboard motor, asserting product liability claims based on the lack of a propeller guard.

As discussed above, maritime law has both a locality and a nexus element. This Court in Sisson defined maritime law as the body of law that applies to events involving a vessel on navigable waters that pose a potential hazard to maritime commerce and that bear a substantial relationship to traditional maritime activity. Respondents do not dispute the locality element. They concede that the subject accident involved a vessel on navigable waters.

Respondents and the Illinois Appellate Court, however, contend that maritime law does not apply to this case because it involves recreational boating and therefore lacks a sufficient nexus with traditional maritime activity. Under Sisson, this nexus element consists of two parts. First, the event must pose a potential hazard to maritime commerce. Analyzing the facts broadly, the loss of a passenger overboard satisfies this requirement. See Complaint of Bird, 794 F. Supp. at 580; Foremost, 457 U.S. at 675.

Second, the event must arise out of an activity that bears a substantial relationship to maritime activity. Here, the relevant activity, defined in general terms as mandated by Sisson, is the navigation of a recreational boat. As determined

in Foremost, navigation of a recreational boat is substantially related to maritime activity. In fact, both the majority and concurring opinions in Sisson suggest that almost everything done by a boat in navigable waters is related to maritime activity. Accordingly, the Illinois Appellate Court's reliance on Delta County Ventures, Inc. v. Magana, 986 F.2d 1260, is questionable. Magana is the most recent decision in a line of cases involving activities commenced from an anchored vessel which hold that maritime law does not apply essentially because the vessels were not being used as vessels but rather as floating work platforms. Not only is Magana distinguishable on its facts,[6] but in light of Sisson, the survival of this line of cases is in doubt.[7] Therefore, respondents and the Illinois Appellate Court lack any support for their contention that the activity in this case does not bear a substantial relationship to maritime activity.[8] This lack of

---

[6]The factual distinctions include: (1) the boat here was in operation when decedent fell overboard while the boat in Magana was anchored, (2) the decedent here was injured when she came into contact with the boat while the injuries in Magana were not caused by the vessel, and (3) the decedent here "fell" overboard while the injured party in Magana "dove" off the boat.

[7]See Magana, 986 F.2d at 1264 (Kozinski, J., dissenting); Complaint of Bird, 794 F. Supp. at 579 (suggesting Sisson limited or overruled theses cases); Coats v. Penrod Drilling Corp., 5 F.3d 877, 885-86 (5th Cir. 1993) (applying maritime law to claims of a worker injured while working on a stationary oil rig in navigable waters).

[8]The Illinois Appellate Court also relied upon Kunreuther v. Outboard Marine Corp., 715 F. Supp. 1304 (E.D. Pa. 1989) ("Kunreuther I"), even though it admitted that the court had withdrawn that opinion. The Kunreuther I court held that Pennsylvania law applied to issues of causation and damages and Jamaica law applied to other issues, including liability, in a wrongful death action arising when the propeller of an outboard motor struck the decedent while she was snorkeling in Jamaican waters. In Kunreuther II, 749 F. Supp. 658 (E.D. Pa. 1990), the court modified its prior decision by ordering that Pennsylvania law be applied to all issues. Ultimately, in Kunreuther III, 757 F. Supp. 633

support caused the Illinois Appellate Court to distort the holding in Magana (that activities off of stationary boats are not governed by maritime law) to the inaccurate statement that "aquatic recreation involving a pleasure boat" is not governed by maritime law. Woltering v. OMC, 615 N.E.2d 86, 88 (Ill. App. 1993). Clearly, this statement directly contradicts decisions of this Court.

Furthermore, nothing about the vessel involved in the present case exempts it from the federal policy of uniformity. The vessel here is a Class 1 vessel under United States Coast Guard standards, and its design is regulated by Coast Guard regulations under the Federal Boat Safety Act, 46 U.S.C. § 4301. Vessels which are far less traditional than this have been held covered by maritime law. See Wahlstrom, 4 F.3d 1084 (involving a personal watercraft). In fact, the design defect (unguarded propeller) alleged by respondents was the subject of extensive United States Coast Guard hearings and a National Boating Safety Advisory Council Report. See Elliott v. Brunswick Corp., 903 F.2d 1505 (11th Cir. 1990), cert. denied, 498 U.S. 1048 (1991); Mowery v. Mercury Marine, 773 F. Supp. 1012 (N.D. Ohio 1991). Thus, to say that this case only concerns a matter of state law and does not implicate the uniformity of maritime law is misleading.[9] Moreover, to draw arbitrary distinctions between whether the decedent "fell" overboard (clearly a traditional maritime event)

(E.D. Pa. 1991), the court completely withdrew the original order and determined DOSHA applied to all issues. Accordingly, the court mistakenly analyzed general maritime law under Executive Jet in Kunreuther I and ultimately applied statutory maritime law in Kunreuther III. Moreover, the facts in Kunreuther I are distinguishable from the facts of the present case.

[9]Although federal maritime law governs cases arising from a vessel on navigable waters, the cases need not be brought in federal court. See "Savings to suitors" clause, 28 U.S.C. § 1333 (1993).

or "dove" overboard (a recreational endeavor) would seem to constitute the exact "line-drawing" rejected by Foremost.

For the reasons stated, the Illinois Appellate Court's decision lacks any basis in law and reaches an incorrect result. The NMMA urges this Court to recognize that the decision below stands as a direct contradiction of this Court's ruling in Sisson and every case that has been decided since Sisson. Accordingly, this Court should grant OMC's Petition for a Writ of Certiorari, reverse the Illinois Appellate Court's finding that maritime law does not apply to this case, and affirm the trial court's entry of summary judgment in OMC's favor.

II. The Illinois Appellate Court Erroneously Reversed The Trial Court's Finding That Decedent's Nondependent Parent And Sibling Could Not Recover Loss Of Society Damages Under Maritime Law.

If this Court determines that maritime law applies, this Court must also reverse the Illinois Appellate Court's holding that respondents may recover loss of society damages. Consistent with the policy of uniformity advocated above, this Court created a general maritime wrongful death cause of action in Moragne v. States Marine Lines, Inc., 398 U.S. at 378, to parallel the exclusive remedies provided for under the Jones Act, 46 U.S.C. § 688 (1988), and the Death on the High Seas Act, 46 U.S.C. § 761 (1988). The Moragne Court called for a uniform remedy for maritime deaths of nonseamen within state territorial waters to have preemptive effect over state wrongful death statutes. 398 U.S. at 378. Accordingly, nondependent survivors of decedents in Moragne actions cannot recover because the federal maritime statutes limit recovery to dependent survivors of seamen. See Truehart v. Blandon, 672 F. Supp. 929, 938 (E.D. La. 1991); Anderson v.

Whittaker Corp., 692 F. Supp. 764, 772; Lipworth v. Kawasaki Motors Corp., U.S.A., 592 So.2d 1151, 1155 (Fla. App. 1992). Similarly, plaintiffs in Moragne actions cannot recover non-pecuniary damages, such as loss of society, because such damages are not available under the federal maritime statutes. Miles v. Apex Marine Corp., 498 U.S. 19 (1990). Recently, the Second Circuit Court of Appeals expressly stated that "[w]e agree with the overwhelming majority of the pertinent federal decisions that nondependent parents cannot recover damages for loss of society in a general maritime action." Wahlstrom, 4 F.3d at 1092.

Although this Court has not ruled on the damages available to nondependent survivors in Moragne actions, prior decisions of this Court and subsequent lower federal courts indicate that respondents in the present case cannot recover loss of society damages in their general maritime wrongful death cause of action. Respondents, decedent's father and sister, were not financially dependent upon the decedent. Furthermore, damages for loss of society constitute non-pecuniary damages disallowed in federal maritime actions.

CONCLUSION

As shown herein, the case at bar presents a model situation for the application of maritime law. The Illinois Appellate Court's decision constitutes a departure from numerous decisions of this Court and of other federal courts. The facts satisfy all of the elements established by this Court in Sisson. Failure to apply maritime law to this case because it "involved a pleasure boat" will disrupt the uniformity mandated by this Court in actions involving vessels on navigable waters. If the Illinois Appellate Court's decision is not reversed, future recreational boating litigants will be uncertain as to what rules govern their conduct and their liability. This case will add unreasonable inconsistency in a

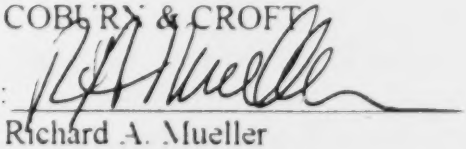
field of law required by both the United States Constitution and this Court to be uniform.

This Court should hear this case in order to clarify the application of maritime law to recreational boating and rule that recreational boating is maritime commerce. In the alternative, this Court should resolve the lingering doubts that exist in lower courts, such as this one, that recreational boating is governed by maritime law to the same extent as any commercial accident on navigable waters.

Because this case presents important questions concerning maritime law and in order to correct the errors created by the Illinois Appellate Court, the NMMA respectfully encourages this Honorable Court to grant OMC's Petition for a Writ of Certiorari, and upon consideration of this case on the merits, to reverse the decision of the Illinois Appellate Court and affirm the finding of the Circuit Court of Madison County that general maritime law applies to the present case and prevents respondents' recovery of loss of society damages.

Respectfully submitted,

COBURN & CROFT

By: 

Richard A. Mueller
One Mercantile Center
Suite 2900
St. Louis, Missouri 63101
(314) 621-8575

Counsel for National Marine
Manufacturer's Association,
As Amicus Curiae